No 216
~~No. 595~~

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1916.

J. R. DARNELL, Appellant,

versus

GEORGE R. EDWARDS, ET AL., Appellees.

Appealed from the District Court of the United States
For the Southern District of Mississippi,
Jackson Division.

BRIEF FOR APPELLEES.

GEO. H. ETHRIDGE,
Asst. Attorney General of Mississippi
For The Appellee.

Mr. James Stone,
Messrs. Woods & Kuykendall,
And
Mr. J. B. Harris,
Of Counsel.

IN THE

SUPREME COURT OF THE UNITED STATES

No. 595

OCTOBER TERM, 1916.

J. R. DARNELL, APPELLANT,

vs.

GEORGE R. EDWARDS, ET AL., APPELLEES.

Appealed from the District Court of the United States For the Southern District of Mississippi, Jackson Division.

BRIEF FOR APPELLEES.

We desire to say at the outset, that there can be no difference of view as to the law governing this case. There is no contention on the part of the appellees that a state, through its legislature, or any tribunal created by it, can deprive a citizen of property without due process of law, or enforce any schedule of rates or tariffs for a railroad company or other corporation which is confiscatory. The question here is purely one of fact, that is: Are the rates and tariffs, established by the Mississippi Railroad Commission and attacked by the complainant, shown by the evidence to be confiscatory, as claimed?

The opinion of this Court in the recent case of *Simpson vs. Shepherd*, 238 U. S. 350, 57 Law Ed., 1511, is such a complete and exhaustive review of the whole subject of the powers of Congress and of the states in reference to rate making, that it will hardly be nec-

essary to cite any other authority. The principles governing this case are practically all stetled by that case; but, we will state here certain principles of law with special application to the case which are fundamental and well settled by numerous decisions of this Court, and to which we think it advisable to call the Court's special attention.

First. That the burden of proof is on the complainant to show *clearly*, that he is entitled to the relief sought. If the case should be treated as an ordinary proceeding for an injunction, the complainant has not made out his case.

> "An injunction is a transcendant or extraordinary power, to be used sparingly and only in a clear and plain case."
>
> *Irwin vs. Dixion*, 9 How. 10, 13, Law. Ed., 25.
>
> "To obtain an injunction, the right must be clear, the injury impending and threatened, so as to be averted only by the protecting preventive process of injunction."
>
> *Truly vs. Wanzer*, 5 How. 141, 12 Law Ed., 88.

These rules apply with special force to a case on final hearing on an application for a perpetual injunction, as in the case at bar.

Second. This rule applies with additional, and peculiar force in cases where an attack is made, as in the case at bar, upon the findings of a state tribunal having jurisdiction of the subject, fixing the rates and tariffs of railroad companies and other public service corporations.

In the case of *San Diego Land & Town Company vs. National City*, 174 U. S. 737-750, 43 Law Ed., at page 1160, this Court said:

> "But it should also be remembered that the judiciary ought not to interfere with the collections of rates established under legislative sanction unless

they are so *plainly* and *palpably* unreasonable as to make their enforcement equivalent to the taking of property for public use without such compensation as under all the circumstances is just both to the owner and to the public; that is, judicial interference should never occur unless the case presents, *clearly and beyond all doubt*, such a flagrant attack upon the rights of property under the guise of regulations as to compel the court to say that the rates prescribed will necessarily have the effect to deny just compensation for private property taken for public use." (Italics are ours).

In the case of *Chicago, M. & St. P. R. R. Co. vs. Tompkins*, 176 U. S., page 172, 44 Law Ed., page 420, the Court said:

"In approaching the consideration of a case of this kind (rate making), we start with the presumption that the act of the legislature is *valid*, and upon any company seeking to challenge its validity rests the burden of *proving* that it infringes the constitutional guaranty of protection to property. The case must be a *clear* one in behalf of the railroad company or the legislation of the state must be upheld."

In the case of *San Diego Land & Town Company vs. Jasper*, 189 U. S., 439, 441, 442, 47 Law Ed., 892, 894, 895, the Court said (approving the case of *San Diego Land & Town Company vs. National City, supra*):

"The limited effect of the ordinance must be taken into account when we are called upon to declare it such a *flagrant* attack upon the rights of property under the guise of regulations as to *compel* the court to say that the rates prescribed will necessarily have the effect to deny just compensation for private property taken for public use."

In the case of the *Illinois Central R. R. Co. vs. the Interstate Commerce Commission*, 206 U. S., page 442, 51 Law Ed., at page 1133, the Court said:

"The findings of the Commission are made by law *prima facie* true. This court has ascribed to them the strength due to the *judgments* of a tribunal appointed by law and informed by experience. *Louisville & N. R. R. Co. vs. Behlmer*, 175 U. S. 648, 44 Law Ed., 309; *East Tennessee, V. & G. R. R. Co. vs. Interstate Commerce Commission*, 181 U. S. 1, 45 Law Ed. 719-729. And, in any special case of conflicting evidence, a probative force must be attributed to the findings of the Commission, which, in addition to knowledge of conditions, of environment, and of transportation relations, has had the witnesses before it and has been able to judge of them and their manner of testifying. In the case at bar these considerations are reinforced by a concurrent judgment of the circuit court."

In the case of the *Cincinnati, H. & D. R. R. Co. vs. Interstate Commerce Commission*, 206 U. S. 142, 51 Law Ed., 995, the Court said:

"The statute gives *prima facie* effect to the findings of the Commission, and, when those findings are concurred in by the circuit court, we think they should not be interfered with unless the record establishes that *clear* and *unmistakable* error has been committed."

See, *Cincinnati, N. O. & T. P. R. R. Co. vs. Interstate Commerce Commission*, 162 U. S. 184, 40 Law Ed., 935; *Louisville & Nashville R. R. Co. vs. Behlmer*, 175 U. S. 648, 44 Law Ed. 309.

It is true in the last two cases cited, this Court was dealing with the findings of the Interstate Commerce Commission, but the Mississippi statute makes the findings of the Mississippi Railroad Commission *prima facie* reasonable (Mississippi Code, 1906, Section 4836), and, in addition to this, the District Court of the United States has passed upon and sustained the findings of the Commission.

In the case of *Wilcox vs. Consolidated Gas Co.*, 112 U. S. 20, 53 Law Ed. 383, the Court said:

"The rule by which to determine the question is pretty well established in this Court. The rates must be *plainly unreasonable* to the extent that their enforcement would be equivalent to the taking of property for public use without such compensation as, under the circumstances, is just both as to the owner and the public. There must be a fair return upon the reasonable value of the property at the time it is being used for the public. *San Diego Land & Town Co. vs. National City*, 174 U. S. 739, 43 Law Ed., 1154, 1161; *San Diego Land & Town Co. vs. Jasper*, 189 U. S. 439-442, 47 Law Ed., 892, 894."

"Many of the cases are cited in *Knoxville vs. Knoxville Water Co.*, just decided, 212 U. S. 1. The case must be a clear one before the courts ought to be asked to interfere with state legislation upon the subject of rates."

Where the evidence leaves the matter in doubt, the rates will be sustained.

Northern Pacific Railroad Co. vs. North Dakota, 216 U. S. 580, 54 Law Ed., 624.

In the case of *Simpson vs. Shepard*, 230 U. S. 350, 57 Law Ed. 1511, at page 1562, the Court said:

"It is fundamental that the judicial power to declare legislative action invalid upon constitutional grounds is to be exercised only in clear cases. The constitutional invalidity must be manifest, and if it rests upon disputed questions of fact, the invalidating facts must be proved. And this is true of asserted value as of other facts."

It is presumed that the Commission acted with full knowledge of the situation.

Seaboard Air Line vs. Fla., 203 U. S. 261, 51, Law Ed., 75;

Atlantic Coast Line R. R. Co. vs. Fla., 203 U. S., 256, 51 Law. Ed., 174;

Minneapolis R. R. Co. vs. Minn., 186 U. S., 257; 46 Law Ed., 1151;

Chicago etc., R. R. Co. vs. Tomkins, 176 U. S. 167, 44 Law Ed., 417;
Riggan vs. Farmers Loan & Trust Co., 154 U. S.;
Railroad Commission vs. Cumberland Tel. Co., 212 U. S. 414, 53 Law Ed., 557;
Dow vs. Bievelman, 125 U. S. 680, 31 Law Ed., 841.

Third. One important element in determining the reasonable rates is to determine the present value of the property devoted to the public use, and this value must not be left to conjecture, but must be made clear, and this Court has said in the case of *Simpson vs. Shepard, supra*, that this value must not depend upon mere conjecture, and that it is clear in ascertaining the present value the Court is not limited to a consideration of the amount of the actual investment, as in the question of rates, the burden is upon the complainant to show clearly the present value.

See, also, *San Diego Land & Town Co. vs. Jasper, supra.*

We have, at the risk of tediousness, set out the extracts from the many opinions of this Court in full for the purpose of showing how firmly this Court has settled the rule as to the character of evidence which the complainant party must adduce in a case of this character. It must be more than enough to raise a mere doubt; it must be more than enough to raise a conflict; it must be of such a character as to amount to *proof* that the rates fixed by the State Commission are unreasonable and confiscatory, and we insist that no such proof has been made in this case, and we will now turn to a consideration of the facts as were shown by the record before the Court.

THE FACTS.

We rely upon the following points, among others:

I.

The so-called test or experiment as to the effect of the Commission's rates, was, in fact, no test, because made under radically abnormal conditions, and for too short a period of time.

II.

No showing whatever is made as to the basis for the rates adopted by the complainant further than some other railroads had similar rates.

III.

No showing whatever was made as to the character of the roads which had rates claimed to have been as high as those adopted by the complainant.

IV.

No showing whatever is made as to why the local rates fixed by the complainant should be higher than the rates for the same distances on the Illinois Central Railroad and the Yazoo & Mississippi Valley Railroad and of other roads shown to be of the same character and standard as the Batesville & Southwestern Railroad.

V.

No satisfactory showing was made as to the present value of the property of the complainant devoted to the public use.

VI.

No proper showing was made as to the operating expenses.

VII.

The evidence shows that the rates fixed by the Mississippi Railroad Commission are reasonable.

VIII.

Three tribunals, after full investigation, held the rates fixed by the Mississippi Railroad Commission to be reasonable rates, or that the rates fixed by it were not confiscatory rates.

In order that the Court may get the proper setting of the case, it is important that the relation which the complainant sustained to the whole situation should be gotten clearly before the Court. He was the owner of the land from which the principal part

of the timber, practically all of it, was to be shipped. See the Bill of Complaint, paragraphs 1 to 4. Testimony of Lang, p. 87. He was the owner of practically all of the stock in the corporation designated as J. R. Darnell, Incorporated, which corporation owned the mill to which the timber taken from complainant's land was to be shipped and manufactured into lumber. See Conway's testimony, page 91. He was the President of this corporation. It is true he claims that he had from time to time put practically all of the stock in the name of his sons, but the fact remains that he and his sons owned all but 2 per cent of the stock, *He was also lessee of the railroad.* In other words, the complainant dominated the situation, and the fact that he did so dominate it was referred to in the opinion rendered by the three judges who heard the application for an injunction *pendente lite.* (Page 76, Record.) The Court said:

> "The interest of the plaintiff is both the logging business and the railroad also impairs the value of the usual inference that the operator of the railroad would so operate it as to develop all the business that could be developed and would make the greatest possible profit. It is clear that the interest of the plaintiff in the railroad may be counterbalanced by his interest in the timber that he already owned, and that he may yet desire to acquire at lower figure obtainable because of its inaccessibility to proper railroad facilities and rates. So, it is true that the amount actually expended by the plaintiff to build the railroad in this instance may be no true index to its fair value, since his timber interests may have induced him to build a railroad that could not be expected to be operated profitably as a purely transportation proposition."

In other words, it was manifestly in the mind of the Court, under the peculiar situation shown to exist in this case, it was immaterial to the complainant what the rates were as what he would lose on the railroad proposition he would recoup on the timber. It was

his timber, his railroad, and his mill to which it was being shipped. The Court certainly puts its finger on the quick of the case in considering this phase of the situation. The complainant stood to win in any event. It was immaterial to him what the rates were, how high or how low. He could have made the rates double the amount at which he did place them, and this would have put into his pocket as a railroad owner what might have appeared as a loss on the timber. As a matter of fact, it is shown by the testimony in the case that the rates fixed by the complainant were prohibitory as to all timber owners except himself.

It is shown by the uncontradicted testimony of Vance (page 103 of the Record), a large owner of timber land touched by the railroad, that he could not dispose of this land or the timber thereon on account of the excessive rates fixed by the complainant.

Elliott Lang, the Auditor and Traffic Manager for the complainant, testified (page 88 of the Record) that there were logs lying along the railroad for a considerable time, because the owners of the logs were unwilling to pay the rates demanded by the complainant (page 87 of the Record).

On page 88 of the Record, the same witness testifies that he *did know* that the owners of land other than the complainant would ship logs provided that they could get a rate they wanted, but otherwise not. In other words, the inference drawn by the Court sitting on the hearing of the application for the preliminary injunction, that the complainant, being interested in and controlling both ends of the situation, that is to say, the timber and the railroad, the main purpose actuating him in having the railroad constructed being to market the timber on his land as a private enterprise, he not being interested in the railroad as a transportation proposition, was in a situation to be indifferent as to rates and to place him in such a dominating situation that he could by fixing exorbitant rates force other timber owners to sell to him. The Record shows clearly an attempt on the part of the

complainant to establish an artificial arrangement by which it would be made to appear that he was not, in fact, the master of the situation.

After a complaint had been made to the Mississippi Railroad Commission and a request for a reduction of the complainant's rates, which complaint was filed with the Mississippi Railroad Commission on July 23rd, 1913 (page 55 of the Record), R. J. Darnell Incorporated, which was a party to the contracts made with the Illinois Central Railroad Company for the construction of the road, went through a form of transferring to R. J. Darnell individually, the complainant, of all its interest of whatever kind in the railroad and its equipment. (See pages 27, 29, 31, 34, 35, 42, of the transcript).

It is shown indisputably by the bill of complaint (Tr., page 4), by Elliott Lang (page 81), and by the complainant himself (page 98 of the transcript), that at the time the contracts with the railroad were made and the arrangement entered into, the complainant was the owner of the land and the timber. The complainant, however, claimed that he had sold the timber on the land to R. J. Darnell Incorporated (Page 97 of the transcript.). He does not give the date of this sale, nor was he able to state the terms upon which the sale was made, except that R. J. Darnell Incorporated was to pay "so much per stump," but was unable to state how much. (See page 97 of the transcript.)

The conclusion is inescapable that these transfers were made in fact as a matter of form, and that as a matter of substance the interest of R. J. Darnell in the situation was, in fact, if possible, the effect of the real situation showing R. J. Darnell to be, in fact, the owner and controller of the land, the mill and the railroad. We feel safe in asserting that all of these transactions took place after the complaint was made to the Mississippi Railroad Commission.

We think it important to get this setting of the case clearly in the mind of the Court, and we, therefore, call attention pointedly to these facts.

We will now consider the facts in the order set forth in the foregoing part of the brief.

1. The so-called test or experiment as to the effect of the Commission's rates was, in fact, no test, because made under radically abnormal conditions.

The owners of the timber land, other than the complainant, whose lands were contiguous to or accessible to the railroad, finding the rates fixed by the complainant so high as to be prohibitory applied to the Mississippi Railroad Commission for a reduction of the rate. (See page 46 of the Transcript.) The Commission cited the complainant, and the matter was fully investigated by the Commission, and on the 9th day of July, 1915, made an order disallowing the complainant's rates and fixed the rates which are here complained of. (See pages 47 and 48 of the Transcript.)

On September 19th, 1913, the complainant filed the bill in this cause, asking for an injunction *pendente lite* to be heard at Birmingham, Alabama, before himself, and David B. Shelby, Judge of the Circuit Court of Appeals, and W. I. Grubb, District Judge. Affidavits were filed and the cause came on for hearing on the application for an injunction *pendente lite*, and the injunction was denied, the Court holding that no sufficient showing had been made to justify it in declaring the rates prescribed by the Mississippi Railroad Commission were confiscatory, or at least it would not interfere with the Commission's rates "until the final hearing, as this would afford a period for experiment as to their power to develop new business in volume sufficient to make the Railroad Commission's rates remunerative." (See page 77 of the Transcript.) This order was made on November 10th, 1913. (See page 78 of the Transcript.

The case came on for final hearing on November 7th, 1914, on bill, answer, exhibits and proof. Much testimony was taken.

It was shown by Elliott Lang, a witness for the complainant, that the rates fixed by the Mississippi Railroad Commission were not put into effect until September 10th, 1913, some two months after the order was made, and although the cause did not come on for hearing until the November term, 1914, the period of experimentation extended *only for six months*; that is to say, from September 10th, 1913, until March 31st, 1914. We call the Court's particular attention to the period of experiment testified to. It is shown by the testimony of Lang, that the road was in the course of construction during all that period, in fact until the middle of June, 1914. (See transcript, page 81), and that regular trains had not been run on the road until some time in April, 1914. (See page 81 of the Transcript.) It was further shown by Lang that practically all of the business of the road was hauling logs from the land of complainant for shipment to the mill operated by R. J. Darnell Incorporated, at Memphis. (See page 87 of the Transcript.) The mill operated by R. J. Darnell Incorporated at Memphis was burned on June 15th, 1913. (See testimony of Lang, page 86 of the Transcript.) After the burning of the Memphis mill, R. J. Darnell Incorporated, constructed a mill at Batesville, Mississippi, which mill was placed in operation on March 17th, 1914. (Page 87 of the Transcript.) During the period from June, 1913, to March, 1914, while the mill was not in operation logs from the complainant's land were not shipped over the railroad except such logs as were on hand when the mill at Memphis was burned, about one million feet. (Page 87 of the Transcript.)

On page 84 of the Record, this witness states, that there "was quite a heavy movement shown in the report made by the Railroad Company, ending September 30th, 1913, and then the movement fell off to *nothing*, and picked up again in March, 1914." In other words, it is shown by this testimony, that for the period testified to as the period of experimentation; that is to say, from September 1913, to March 1914, the business

of the railroad had fallen off to nothing. We called attention above to the fact that the Railroad Commission's rates were not pretended to be put into effect until September 1913, and the period of experimentation testified to ended in March, 1914. We do not undertake to say why the complainant established this period testified to as the period of experimentation. Certainly, it is not intended to be inferred from this showing that the falling off of the traffic to *nothing* was the result of putting in the lower rates fixed by the Mississippi Railroad Commission. If that is intended to be the effect of this testimony, then it is the only case on record, we venture the assertion, in which the effect of reducing a rate was to stop all traffic. But, the Railroad Commission's rates had nothing to do with this abnormal traffic condition. It arose from the fact that practically all the business done by the railroad under its highest rates was the shipment of logs from the land of R. J. Darnell to the mill in Memphis, and when that mill was burned the traffic ceased, and ceased for the reason, as testified to by Lang and as shown by the Record, that the rates fixed by the complainant were so high that only the complainant could afford to ship logs over the road. He, though, could, because he dominated the situation, owning the logs, owning the railroad, and owning the mill.

The witness Lang testifies on page 87 of the Record, that there were a lot of logs lying on the right of way for a considerable time which were not shipped because the railroad demanded the interstate rate. He further testifies on page 88, of the Transcript, that the Railroad Company refused to receive any logs for other parties than Darnell at the Railroad Commission's rates which were to be shipped to Batesville, and there re-billed, unless the party would pay the rates established by the complainant. On the same page the witness states, that he did know that logs would be shipped if the owners could get the rates they wanted, otherwise they would not. In other words, that the logs would be shipped if the owners could get the Railroad Commission's rates

to Batesville, otherwise they would not be established.

We wish to call the Court's attention to this further condition. The rates demanded by the complainant are set forth on page 10 of the Transcript, and are as follows:

10 miles and under.....$2.80 per thousand feet.
15 miles and over 10 miles.... 3.35 per thousand feet.
20 miles and over 15 miles.... 3.90 per thousand feet.

This applied to any kind of logs.

It is shown that there is no joint rate with the Illinois Central Railroad, of which the Batesville & Southwestern Railroad, the complainant's road, was in fact a branch with connections at Batesville. It is shown that the rate on logs from Batesville to Memphis, a distance of 61 miles (page 99 of the Transcript), was 4½c per cwt. In other words, $4.50 per thousand. Under the arrangement which had been put into effect by the complainant all shippers of logs over the Batesville & Southwestern road were compelled to pay two local rates; that is to say, the local rate into Batesville plus the local rate on the Illinois Central Railroad from Batesville to Memphis. A simple sum in addition will show how onerous these combined rates were on all shippers except the complainant. For instance: from the station Acee, which is 7 3-10 miles from Batesville (see page 115 of the Record) the rate to Memphis would be $4.50 plus $2.80, in other words, $7.30. From stations fifteen miles, it would be $4.50 plus $3.35, or $7.85; and from Crowder, Mississippi, which is the southern terminus of the road, 15 7-10 miles from Batesville, the rate would be $4.50 plus $3.90; in other words, $8.40 per thousand. The complainant was the only timber owner who found it possible to do business under these rates. He assumed, as is shown by the testimony of Lang above set forth, to determine for himself the character of the shipment, and while he was issuing no contracts either oral or written for through shipment, had no joint rates, merely these local rates into Batesville.

In addition to all this, it was shown that the period selected for experiment covered the winter months, when the logging business would certainly be from natural causes at its lowest ebb, it having been shown that the railroad ran half of its length through low lands, and that these low lands are subject to overflow for about eight or ten miles through which the railroad runs, and that the track is overflowed after heavy rains for a considerable period of time, and that during the period of experiment the track had been washed away three or four times (See pages 97 and 98 of the record, testimony of Darnell); it being also shown that the railroad was not completed during this period but in course of construction; and, further (page 89 of the record), that only part of the train crew was necessary, the traffic being so light, and only one through train a day run.

We respectfully submit that under the conditions shown no test was made. Of course, when the Court referred to an experiment it meant an experiment *made under normal conditions* and not to an experiment made under conditions shown here which rendered it impossible to make anything like a fair test. Under normal conditions, the business of the complainant alone would have greatly swelled the volume of traffic and the revenues of the road. He was the principal shipper, the principal land owner. He practically monopolozed the business, and that being taken out it is not at all remarkable that the business should have shown a loss during the period instead of a profit. Manifestly, the result could not be attributed to the rates put in by the Mississippi Railroad Commission. As we have shown, however, the complainant selected as a period of experiment the very period and under the conditions existing the result would show a large falling off of traffic from causes not dependent upon or attributable to the rates put in by the Mississippi Railroad Commission. Even under normal conditions the period was too short.

In the case of *Norfolk & Western Railroad Co. vs. Connely*, 236 U. S., 605, 59 Law Ed. page 744, the periok of experiment was two years.

In the case of *Northern Pacific Railroad Co. vs. North Dakota*, 236 U. S. pages 585, 590, 59 Law Ed. 755, the period of experiment was over one year.

In the case of *Simpson vs. Shephard*, 230 U. S.; 57 Law Ed. page 1511, the period of experiment was one year.

We submit that on this point alone the Court would be justified in rejecting absolutely the testimony as to the experiment and affirming the case on this ground.

In the cases above cited, the Court will see that the Court held that this experiment must show with clearness that the rates attacked were confiscatory.

In the case of *N. P. Ry. Co. vs. Note of N. Dakota Ex. Rel.* 216 U. S. 580, 54 Law Ed. page 462, the Court holds that where the evidence leaves the matter in doubt the rates will be sustained. In the case at bar, the evidence leaves the matter more in doubt. There was in fact no test at all.

We have shown by the authorities cited in the first part of this brief, that the rule is that mere conjecture and speculations will not be indulged in in cases of this character. The burden of proof is on the complainant to show with clearness beyond any reasonable doubt that the rates attacked are confiscatory, otherwise the rates will be sustained.

II. No showing whatever is made as to the basis for the rates adopted by the complainant further than some other railroads had similar rates.

III. No showing whatever was made as to the character of the roads which had rates claimed to have been as high as those adopted by the complainant.

V. No satisfactory showing was made as to the present value of the property of the complainant devoted to the public use.

We will consider the second, third and fifth points together. It is insisted in the brief of counsel for the appellant that the question before the Court is not the reasonableness of the rates attempted to be established by the complainant, but whether the rates fixed by the Mississippi Railroad Commission were confiscatory. To a certain extent this statement is true, but the complainant is undertaking to defend his rates. He is insisting that they are proper rates, and he should sustain them, and we feel that it is germane to the issues that we should consider his rates. While it is true that the rates of other railroads operated under similar conditions upon like commodities is of evidential value though not conclusive in determining the question of the reasonableness of the rates. It is at the same time well settled that evidence that other railroads had similar rates is inadmissible unless it is shown that the conditions are similar.

See, Beale & Wyman Railroad Rate Regulations, par. 580.

We call the Court's attention also on this subject to the elaborate note to the case of the *Northern Pacific Railroad Co. vs. North Dakota*, in 39 Am. & Eng. Railway Cases, 1906 A at page 16.

See also note to the *Puget Sound Electric Ry. Co. vs. Railroad Commission*, Vol. 27 Am. & Eng. Ann. Cases, 1913 B. page 774.

The only showing made in the case at bar on these points is by the witness Elliott Lang, who testifies on page 85, that he had investigated the rates established by other railroads similar to this road, and, in effect, on roads in Mississippi. This is the extent of his testimony further than setting forth the rates charged by some other railroads.

It is shown in this case and not controverted in any way that the complainant's road was a standard guage road, built under the supervision and for the purpose of becoming a part of the Illinois Central Railroad System.

This was quoted with approval in *Smyth vs. Ames*, and the Court there added:

"It cannot, therefore, be admitted that a railroad corporation maintaining a highway under authority of the State may fix its rates with a view solely to its own interests and ignore the rights of the public. But the rights of the public would be ignored if rates of transportation of persons or property on a railroad are exacted without reference *to the fair value of the property used for the public or the fair value of the services rendered*, but in order simply that the corporation may meet operating expenses, pay interest on its obligations, and declare a dividend to its stockholders."

The Court then goes on to say at page 733, after adverting to certain conditions which might exist rendering branch lines unprofitable:

"Would it be proper, in such cases, to hold that the road should have the right to charge for its intrastate traffic in that section tariff rates high enough to enable it to earn a certain, fixed percentage on its investment? Would not, in such a case, the rates have to be so high as to be *confiscatory of the property of the residents of that State*? (This is practically the result of the rates established by the complainant in the case at bar). Must the public guarantee the railroads a certain income on their investment, regardless of the condition of the country traversed, or whether bad judgment was exercised in the selection of the route? We do not think so. New lines or branches to increase the business of the main line, or the exercise of bad judgment in the building of a railroad, are matters to be considered in determining what rates would be fair and just to the corporation as well as the public. That the railroads are entitled to reasonable profits on their investments, and the public to reasonable rates, or, to express it differently, that the rights of the public and railroad companies are reciprocal, is the correct rule of law.

"In *Reagan vs. Farmer's Loan & Trust Co., supra,* Mr Justice Brewer, speaking for the Court, in the concluding part of the opinion said:

"It is unnecessary to decide, and we do not wish to be understood as laying down as an absolute rule, that in every case a failure to produce some profit to those who have invested their money in the building of a road is conclusive that the tariff is unjust and unreasonable. And yet justice demands that every one should receive some compensation for the use of his money or property, if it be possible without prejudice to the rights of others. There may be circumstances which would justify such a tariff; there may have been extravagance and a needless expenditure of money; there may be waste in the management of the road; enormous salaries; unjust discrimination as between individual shippers, resulting in general loss. The construction may have been at a time when material and labor were at the highest price, so that the actual cost far exceeds the present value. The road may have been unwisely built, in localities where there is not sufficient business to sustain a road. Doubtless, too, there are many other matters affecting the rights of the community in which the road is built, as well as the rights of those who have built the road." 154 U. S. 412, 14 Sup. Ct. 1059, 38 Law Ed. 1014.

In *San Diego, etc. Co. vs. Jasper,* 189 U. S. 439, 446, 23 Sup. Ct. 571, 574, 47 Law. Ed. 892, it was held:

"If a plant is built, as probably this was, for a larger area than it finds itself able to supply, or apart from that, if it does not, as yet, have the customers contemplated, neither justice nor the Constitution requires that, say, two-thirds of the contemplated number should pay a full return.' "

See also *Simpson vs. Shephard, supra,* at page 454, 455, 57 Law Ed. page 1564.

In the case of *Simpson vs. Shephard*, the Court uses this language:

> "It is clear in ascertaining the present value, we are not limited to a consideration of the amount of the actual investment; if that has been reckless, improvident, losses may be sustained which the community does not underwrite."

On page 79 of the transcript, in the testimony of Elliott Lang, is set forth what purports to be a statement as to the cost of construction, or at least the money claimed to have been paid by the complainant. This statement was evidently before the Court sitting on the hearing of the application for the preliminary injunction, and the insufficiency of it is adverted to by the Court in its opinion on page 74 of the transcript. This is but a general statement, and, as was said by the Court below, the correctness of the statement was denied in the sworn answer of the defendant. In the opinion the Court refers to the fact on page 74, that under the contract with the Illinois Central Railroad Company the plaintiff has been repaid the sum of $69,500.00 of the amount expended by it. On page 80 at the bottom of the account, the amount contributed by the Railroad Company is put at $39,584.00, a very wide discrepancy.

As we have said, there is nothing whatever in the record to show what is the value of the service rendered to the public. So, when we say, as we have said above, that there was no proper showing as to the basis for the rates adopted by the complainant, we think the transcript fully bears us out. Nothing is shown except an arbitrary adoption of rates of some other railroad which had similar rates to those charged by the complainant.

IV. No showing whatever was made as to why the local rates fixed by the complainant should be higher than the rates for the same distances on the Illinois Central Railroad and the Yazoo & Mississippi Valley Railroad, located in same territroy, and of

other roads not located in same territory, shown to be of the same character and standard as the Batesville & Southwestern Railroad.

The roads were of the same construction and of the same character and grade. The Batesville & Southwestern road was built uhder a charter gotten out by the Illinois Central Railroad Company; was built according to the Illinois Central Railroad Company's standard for the purpose of being operated in connection with it.

J. H. Hines testifies on page 101 of the record, that the road was a fine one.

J. G. Neudorfer testifies on page 102, that on on the railroad track there is scarcely no grade. It is comparatively straight for about fifteen miles.

T. F. Griffith testifies on page 106 of the transcript, that there were no grades or curves, and one of the finest road-beds he had ever seen.

H. M. Mims, on page 1107 of the transcript, that the road was of standard guage and the best in grade and best in construction.

None of the conditions of the other roads, the rates of which were adopted by Lang, are in evidence. The Court would require more than this general statement, and even if the roads were similar the arbitrary adoption of their rates would not establish the reasonableness of complainant's rates. He leaves out of view entirely the real basis, or the real test, which must be applied to determine the reasonableness of the rates. What these tests are are set forth in the case of *Simpson vs. Shephard, supra.* These tests are the present value of the property claimed to be devoted to the public use, and the value of the service to the public, and these facts must be shown with clearness, as was said in the case of *Simpson vs. Shephard, supra,* at page 405, 57 Law Ed. at page 1563:

"But it does not justify the acceptance of results which depend upon mere conjecture. It is fundamental that the judicial power to declare legislative action invalid upon constitutional grounds is to be

exercised only in clear cases. The constitutional invalidity must be manifest, and if it rests upon disputed questions of fact, the invalidating facts must be proved. And this is true of asserted value of other facts."

In any condition there is absolutely no showing or attempted showing as to the value of the service rendered. The interests of the complainant are not the only thing to be looked at in this case. He seems to have proceeded entirely on the theory, that the determining question was as to whether he had made a profit, or whether he had adopted such rates as would show a profit?

In the Arkansas Railroad Rate Cases, 168 Fed. at page 732, the Court said:

"As to what constitutes a reasonable rate must depend upon the facts of each case, and cannot be determined without reference to the interests of the public. *Covington & Lexington Turnpike Co. vs. Sanford*, 164 U. S. 578, 41 Law. Ed. 560; *Smyth vs. Ames*, 169 U. S. 166, 42 Law Ed. 819; *Reagan vs. Farmers Loan & Trust Co., supra*; *San Diego Land Co. vs. National City*, 174 U. S. 739. 755, 43 Law Ed. 1154; *Chicago & Northwestern R. R. Co. vs. De* (C. C.) 35 Fed. 866, 878, 1. L. R. A. 744.

In *Covington, etc. Turnpike Co. vs. Sandford* the Court said:

'It cannot be said that a corporation is entitled or right, and without reference to the interests of the public, to realize a given per cent. upon its capital stock.''

M. C. Moore, a witness for the defendant, (page 107 of the transcript) was the rate expert for the Mississippi Railroad Commission and the Mississippi Department of Justice. He had had twenty years experience with rates. He has made investigation as to rates on logs on the different roads in the State of Mississippi, and he filed with his testimony the tariff

of several railroads, some of which were put on voluntarily and some by the Commission, all of which were practically in force at the time of the hearing of the cause.

The Illinois Central tariff, which appears on page 108, is as follows:

For 5 miles or less, 1¼cts. per 100 [illegible] ($1.25 per thousand);
For 10 miles and over 5, 1¼cts. per 100 lbs.
For 15 miles and over 10, 1¼ cts. per 100 lbs.
For 20 miles and over 15, 1½ cts. per 100 lbs.
For 25 miles and over 20, 1¾ cts. per 100 lbs.

The Yazoo & Mississippi Valley Railroad Company publish the same rates for the same distance. The New Orleans Great Northern Railroad publish a lower rate.

In fact, the witness files with his testimony the tariffs of fourteen roads, all of which except three are roads operating in Mississippi, and it will be found by comparison that the tariffs on logs on all of these roads in no instance exceeds the rates fixed by the Commission, but in most instances are less for the same distances. There is no attempt whatever to show that there is any difference whatever in conditions existing on the Illinois Central and the other roads which would justify a difference in rates on the complainant's road. The roads whose tariffs are set forth by Mr Moore are all standard roads, just as the complainant's road is, and certainly there should have been some showing as to why the complainant should be allowed to charge double the rates which the Illinois Central and other roads charge, or why there should be a different rate on his road. We insist that there is nothing whatever before the Court which would justify it in saying that the rates fixed by the Mississippi Railroad Commission were confiscatory rates.

We call the Court's attention to this view of the case. It is shown by the testimony, and admitted, that the railroad of which the complainant is the

lessee was built under a contract with the Illinois Central Railroad Company as a feeder to that road.

Mr. Parks, a witness for the complainant, (page 94 of the record), says: "I know the railroad was built in accordance with the contracts entered into and referred to. *All the incorporators of the Batesville-Southwestern Railroad were connected with the Illinois Central Railroad in some capacity.* * * * * * * * * * The Batesville & Southwestern Railroad was organized as a corporation for the purpose of satisfying the laws of Mississippi." "The reason that actuated the Illinois Central Railroad Company in making the contract was that it was shown that it was a business propostion for them to enter into the contract." (See also the testimony of Baldwin, page 95 of the record).

In other words, the Batesville & Southwestern Railroad leased and operated by the complainant, was built as a feeder and practically as a branch of the Illinois Central. It was built under its supervision, and is of the same standard as the main line of the Illinois Central Railroad, and under the contract will be taken over by the Illinois Central Railroad ultimately as part of its system. Now, suppose we were to substitute the Illinois Central Railroad for Darnell. Is there any reason shown by this record why this branch should charge a higher local rate than is charged by the Illinois Central Railroad main line on the like commodities for the like distances? Is there any reason shown by this record why this branch road should be allowed to charge twice as much as is charged on the Illinois Central Railroad and the Yazoo & Mississippi Railroad for the same distances and on like commodities? There can be no question whatever that this road is a feeder to the Illinois Central, and is practically now a branch of that road. Does the fact that this branch, in order to satisfy the laws of the State of Mississippi, was incorporated as a Mississippi road and leased to Darnell affect the question as to the reasonableness of the rates or afford any reason for putting on a different rate on the branch road than

the one which prevails on the Illinois Central Railroad main line? It must be assumed that the rates charged by the Illinois Central Railroad on its main line for the like distances and like commodities is a reasonable rate; that it is not a confiscatory rate. What reason is shown by the record for holding the rates fixed by the Mississippi Railroad Commission on the branch line, are unreasonable or confiscatory?

See Arkansas, Rate Case 168 Fed. 720.

VI. No proper showing was made as to the operating expenses. There is a statement in the record (page 12) purporting to show the operating expenses of the road for a period from July 1st, 1912, to June 30th, 1913. The Court below rejected this statement of the operating expenses, because it contained the item of $8,133.35 claimed as rental; that is to say, the item shown that the sum above mentioned was charged in operating expenses as one-twentieth of the amount claimed by the complainant to have been invested. On page 83 of the record, there is a general statement of the operating expenses for nine months ending March 31, 1914, and also of the earnings for that period. There is nothing whatever to show of what these operating expenses consisted. The road was at that time in course of construction, and while there is a general statement in the brief of counsel on page 53, that the operating expenses would increase, there is absolutely no showing in the transcript as to why they would increase, or what elements entered into the operating expenses as shown by the testimony of Lang, (page 84 of the transcript), and the whole statement must be rejected as highly misleading, because, as we have shown above, the conditions during the period covered by the nine months were radically abnormal, the road doing practically no business on account of the inability of the complainant to ship his logs owing to the burning of his mill as set forth.

VII. The evidence shows that the rates fixed by the Mississippi Railroad Commission are reasonable.

We take it that the Court will reject as being an insufficient showing, the statement as to the result of the operation of the road during the "nine months" (should be six months) testified to. In the first place, the Mississippi Railroad Commission had before it in fixing these rates the rates for the same commodities in force upon other railroads of like character in Mississippi, some of which were voluntarily put in by the railroads and others put in by the Commission. The defendant offered evidence as to the reasonableness of the rates.

J. H. Hines (page 101 of the record) testifies in detail as to the cost of operation of such a road as the complainant's and that the rates fixed by the Railroad Commission were reasonable. He states that he had experience in operating logging roads, and knew the expenses in operation and maintenance of them, and had operated himself logging roads, and was acquainted with the country traversed by the complainant's road.

J. G. Neudorfer (page 102) testified, that he had been engaged in the railroad business for about thirty years in the capacity of engineer, master mechanic and superintendent; that he was the superintendent of the Mississippi Division of the Illinois Central Railroad Company at the time the complainant's road was started. He gives in detail the expenses of operation and states that if the road had the volume of business which complainant testified it would have in normal times, the rates fixed by the Mississippi Railroad Commission would be remunerative rates.

M. C. Moore, the rate expert (page 107) testifies that these rates were reasonable, and gives his reasons for so stating by setting forth the tariffs of roads similar to the road in question of the same grade and standard. There is nothing whatever shown in the record, except that for a period, while conditions were chaotic and wholly abnormal, the road did not make a profit which in any way tends to impeach the reasonableness of the rates fixed by the Mississippi Railroad Commission. The fact that the rates fixed by the

complainant had been filed with the Interstate Commerce Commission is not evidence of the reasonableness of those rates or of the unreasonableness of the Mississippi Railroad Commission's rates.

In the case of *Simpson vs. Shephard, supra*, at page 417, the Court, in speaking to this point, says:

"But the State wide authority controls the carrier, and is not controlled by it, and the idea that the power of the State to fix reasonable rates for its internal traffic is limited by the mere action of the carrier in laying interstate rates to places across the State border is foreign to our jurisdiction."

The Interstate Commerce Commission does not and cannot by the express provisions of the act deal with intrastate rates.

VII. Three tribunals, after full investigation, held the rates fixed by the Mississippi Railroad Commission to be reasonable rates, or that the rates fixed by it were not confiscatory rates.

1st. The Mississippi Railroad Commission, after full investigation of the Mississippi rates, and with full knowledge of all of the surroundings and with the witnesses before it, established the rates as reasonalbe.

2nd. The three judges, sitting on the hearing of the application for a preliminary injunction, held that there was no sufficient showing before it upon which they would be justified in declaring that the rates fixed by the Mississippi Railroad Commission were confiscatory.

3rd. The District Court sitting on final hearing held the rates to be reasonable.

In the case of the *Illinois Central Railroad Company vs. Interstate Commerce Commission*, 206 U. S. 42, 51 Law Ed. 1133, the Court said:

The findings of the Commission are made by law *prima facie* true. This Court has ascribed to them the strength due to the judgments of a tribunal

appointed by law and informed by experience. * * * And, in any special case of conflicting evidence, a probative force must be attributed to the findings of the Commission, which, in addition to knowledge of conditions, of environment, and of transportation relations, has had the witnesses before it and has been able to judge of them and their manner of testifying. In the case at bar these considerations are reinforced by a concurrent judgment of the Circuit Court."

See also *Cincinnati H. & D. R. Co. vs. I. C. Com.* 206 U. S. 142.

It is strenuously insisted by counsel for the complainant that the Court below erred in rejecting the item of one-twentieth of the amount claimed by complainant to have been invested in the enterprise, which item was charged in the estimate of operating expenses as rental. This item was properly rejected. Counsel clains that this should have been allowed, because at the end of twenty years under the contract the complainant's interest in the road ceases, and will be practically worthless. In other words, the claim is that the complainant has the right not only to earn a profit on the money claimed by him to have been invested in this enterprise, but to impose upon the public under the guise of operating expenses the burden of paying back to him the money which he has so invested. All that the complainant could claim under any authority is a fair return upon the money invested. It would be monstrous to say that the public should be taxed, in addition to this, with the cost of the actual investment. Complainant has embarked upon an enterprise looking to the marketing of timber growing on a very large tract of land owned by him. He purposes to make the public shoulder the entire burden. He was to take no risk. If he has made with the Illinois Central Railroad an injudicious contract, or if he has made an unwise investment, that is not a matter of public concern. He cannot, as stated by the

Court in the cases cited *supra* expect the public to underwrite his investment.

It is unnecessary we take it to argue this proposition further. It could not be justified from any point of view.

7. It is also claimed, and it seems with seriousness, by counsel for the appellant, that he had a right to fix his rates as he chose, freed from any control by the Mississippi Railroad Commission, because he was operating the road as an individual lessee and not as corporation. The complainant was operating as a common carrier, operating a railroad by virtue of the charter granted by the State of Mississippi making it a common carrier. He could not operate it in any other way. The Mississippi statute expressly gives the Mississippi Railroad Commission the right to fix the rates and tariffs of all railroads and other common carriers. (See Chapter 39, Mississippi Code, 1906, under the head of Supervision of Common Carriers). We think it entirely a waste of the time of the Court to undertake to answer this proposition.

In conclusion, we respectfully submit that the judgment of the Court below should be affirmed. The complainant has utterly failed to meet the burden imposed upon him by the law of making a clear proof, freed from any just or reasonble doubt that the rates fixed by the Mississippi Railroad Commission were confiscatory.

We submit that the conclusion is inescapable from the reading of this record that the complainant did not wish to develop traffic on this railroad, but as intimated by the Court below, in its opinion, he was not operating the railroad as a transportation proposition, but as a private enterprise for the purpose of developing his large tract of land and marketing the timber thereon. This being the overshadowing purpose, he not only did not endeavor to develop business but obstructed development in every possible way. He was dominating the entire situation and had,

as he thought, the other timber owners in the territory traversed by the road by the throat. He had put himself in a position where the question of rates did not affect him. He embarked upon the enterprise for the purpose of marketing the timber on his land out of which he purposed to make his profits, and the question of rates was as to him a matter wholly immaterial.

We respectfully submit that the judgment of the Court below should be affirmed.

George H. Ethridge

Asst. Attorney General of Mississippi
for the Appellee

James H. Flowers
For Appellee

MR. JAMES STONE,
MESSRS. WOODS AND KUYKENDALL,
AND MR. J. B. HARRIS,
of Counsel.